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Supreme Court, U.S.
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No. 00-945

In The

# Supreme Court of the United States

October Term, 2000

A. MICHAEL KAGAN,

*Petitioner,*

– against –

UNITED STATES OF AMERICA,

*Respondent.*

*On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.*

## BRIEF FOR PETITIONER A. MICHAEL KAGAN IN REPLY TO THE RESPONDENT'S OPPOSITION

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# BRIEF FOR PETITIONER A. MICHAEL KAGAN IN REPLY TO THE RESPONDENT'S OPPOSITION

## STATEMENT OF FACTS

As a preliminary matter, Mr. Kagan raises factual matters presented in the Government's Opposition. Contrary to the government's assertion, Mr. Kagan was not convicted of securities fraud, insurance fraud, and making false statements. (Government's Opposition, "Gov. Opp." at 2). Rather, he was merely convicted of mail fraud and conspiracy. Mr. Kagan also objects to any suggestion that he stood in a similar position with his co-petitioners. They allegedly committed crimes from 1987 to 1995, over an eight year period. However, Mr. Kagan's purported involvement was limited to an 8-month period.

In addition, while the Government states that Mr. Kagan received $425,000 from UFG for his supposed role in a fraud (Gov. Opp. at 3), it should be noted that evidence showed that these were legitimate payments for the sale of his insurance agency to UFG. Furthermore, the government neglected to mention that Mr. Kagan was the founder, creator, and an investor in CPF, as well as a 10 percent shareholder in the company, circumstances which demonstrate that he had no interest whatsoever in harming CPF. Also, CPF's failure to file due diligence forms and follow standard loan processing procedures which would have guaranteed the loans and prevented insolvency, indicated that CPF was never defrauded. In fact, CPF continued to recover monies and it may not have suffered the losses the government contends.

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Mr. Kagan adopts the arguments presented by his co-petitioners to the extent that they are not inconsistent with the claims he advances before this Court. *See* Petition for Writ of Certiorari of Rumignani and Viera, No. 00-7360.

## ARGUMENT

**In the absence of a jury finding that Mr. Kagan defrauded a financial institution under 18 U.S.C. § 1341, the principles announced in *Apprendi v. New Jersey* were violated**

The government concedes the main contention interposed by Mr. Kagan -- that is, without a jury finding that the underlying

fraud "affects a financial institution," a sentence above five years for a mail fraud conviction constitutes error under *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). (Gov. Opp. at 10).[1]

In an attempt to ignore the clear import of *Apprendi*, the government argues that Mr. Kagan was convicted of multiple mail frauds. It then poses the argument that, because the district court was silent as to whether the mail frauds ran concurrently or consecutively, we should assume that one count was intended to run consecutively to the others to achieve the 70 month sentence that was imposed (10 months above the 5-year maximum). (Gov. Opp. at 11). This argument is untenable.

Significantly, 18 U.S.C. § 3584(a) provides that:

> Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively.

Here, there is no statutory mandate to run the mail frauds consecutively. Therefore, given the court's silence on the matter, the only reasonable conclusion to draw is that the mail frauds were

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1 The government also argues that the failure to allege the financial institution factor in the indictment did not offend *Apprendi*. (Gov. Opp. at 10, n.7). However, when *Apprendi* is read in conjunction with *Jones v. United States*, 526 U.S. 227 (1999), a case cited approvingly by *Apprendi*, it is clear that such a deficiency in the indictment establishes another ground for reversal in this case. *Apprendi* borrowed the following language from *Jones* to demonstrate the point:

> [U]nder the Due Process Clause of the Fifth Amendment and the *notice* and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt. (emphasis added).

*Apprendi*, at 2355, quoting *Jones* at 243, n. 6; *see also Hamling v. United States*, 418 U.S. 87 (1974)(requiring indictment to set forth each element of the crime that it charges).

intended to run concurrently.

Moreover, Mr. Kagan was sentenced in the pre-*Apprendi* era where the trial court would not have considered the financial institution factor under 18 U.S.C. § 1341 as an offense element requiring the constitutional protections mandated by *Apprendi* and *Jones*. As such, it is presumptuous for the Government to now argue that the district court anticipated *Apprendi* and structured the sentence to comport with the principles announced therein.

The government's assertion that Guideline § 5G1.2, which authorizes courts to impose consecutive sentences to the extent necessary to produce the total punishment under the Guidelines, does not further its cause. It is improper for the Guidelines to "trump" the authority of Congress and cause a higher sentence than would be called for under Congressional statutes. *Edwards v. United States*, 523 U.S. 511, 515 (1998). Similarly, it would be unconstitutional for the Sentencing Commission to manipulate a sentence to circumvent the proof beyond a reasonable doubt requirement. *McMillian v. Pennsylvania*, 477 U.S. 79, 84-85 (1986). Both these tenants are offended if the 5G1.2 construct proffered by the government is employed.

Specifically, Congress, through a statutory mandate, authorized district courts to impose concurrent or consecutive sentences. *See* 18 U.S.C. § 3584. Also, by setting concurrent terms as a default in the absence of a court directive, it made clear the preference for concurrent terms. *See* 18 U.S.C. § 3584(b). In this case, each mail fraud count involved the same victim, CPF, over a short period of time. All the offenses were similar in design and purpose. And, there was nothing extraordinary about the alleged offenses. Consequently, under the authority of 18 U.S.C. § 3584, concurrent sentences for the mail fraud convictions was the appropriate formulation.

Furthermore, in this case, it was the four level Guideline enhancement for "substantially jeopardizing the safety and soundness of a financial institution" (U.S.S.G. § 2F1.1) that lifted Mr. Kagan's sentence above the 5-year maximum for mail fraud, the same factor that must be found by a jury beyond a reasonable doubt to justify a sentence in excess of 5 years on a group of

concurrent mail fraud counts.[2] Consequently, 5G1.2 sets consecutive terms in derogation of what would normally be a concurrent term sentence. At the same time, 5G1.2 draws from a factor (financial institution) that Congress required a proof beyond a reasonable doubt finding to elevate the sentence beyond the 5-year maximum, the sentence that would have ordinarily been imposed under statutory authority without regard to the Guidelines.

In sum, through the operation of 5G1.2, the Guidelines are dictating a higher sentence than the one that would be imposed pursuant to statutory law. And, the Guidelines draw from a factor that should have been found beyond a reasonable doubt. Such a circumstance cannot be reconciled in light of the principles announced in *Apprendi* or its progeny.

Mr. Kagan also challenged the Guideline enhancements based on *Apprendi*. In particular, he contends that the Guideline enhancements and the restitution order run afoul of *Apprendi*, and he cites to Justice Thomas's concurrence in *Apprendi* to support his claim. Petition for Writ of Certiorari of A. Michael Kagan, No. 00-945, at 14. However, the government merely addresses the Guideline attack made by his co-petitioners, Rumignani and Vieira. Notably, Mr. Kagan challenged the financial institution enhancement made by them, and to the extent their arguments are consistent with his claims, he joins them. See Petition for Writ of Certiorari of Rumignani and Viera, No. 00-7360, at 11-17. Mr. Kagan also contested the enhancements for the amount of the alleged fraud, for abusing a position of trust, for more than minimal planning and for restitution. And, he takes this opportunity to raise recent precedent, that was unavailable when his initial petition was filed that bears on the Guideline enhancements claim.

Judge Nickerson, of the Eastern District of New York, recently held that *Apprendi* applies to Guideline enhancements. *United States v. Glen Norris*, NYLJ, p. 33, col. 1 (February 13,

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2 Removing only the financial institution enhancement, Mr. Kagan would have received a sentence between 46-57 months.

2001). The Court in *Norris*, citing *Mistretta v. United States*, 488 U.S. 361 (1989), observed that the Guidelines have the force and effect of law. It therefore equated the Federal Sentencing Commission with Congress and stated that the Guidelines are indistinguishable from criminal penalty statutes. As a consequence, factors that lead to Guideline enhancements are not merely sentencing factors which can be found by a court by a preponderance of the evidence, but are crime elements that must be charged in the indictment, presented to a jury and found beyond a reasonable doubt.

Mr. Kagan therefore requests that the Court consider the arguments advanced in his initial petition and those raised by his co-petitioners which he joins in light of the precedent established by *United States v. Glen Norris*. He also reiterates his claim that since the Guideline enhancements and the restitution were not charged in the indictment, presented to the jury or found beyond a reasonable doubt, that his sentence must be vacated.

**Mr. Kagan's right to testify claim presents a viable avenue for this Court to resolve a split in the circuits; and the claim turns on a issue of law, not fact, which should be addressed by this Court.**

The government concedes that there is a circuit conflict. It then argues that granting the writ is inappropriate here because even if this Court settles the circuit conflict that underlies the right to testify claim in Mr. Kagan's favor, it will not affect the outcome of his case. It also contends that the claim is fact-bound and therefore does not warrant review by this Court. The government's position is based on a misunderstanding of Mr. Kagan's argument.

The government overlooks that Mr. Kagan raised a two tiered legal argument that is interconnected. First, he argues that the trial courts have an affirmative obligation to inquire about the right to testify -- the portion of his argument that addresses the circuit conflict. Second, he argues that in order for the courts to be satisfied that this obligation is fulfilled, the inquiry must focus on the right to testify, not the general right to be present and assist in one's defense. Therefore, this Court's consideration of the

affirmative obligation doctrine, which places the circuit conflict squarely before it, is a necessary foundation for a reversal, and a resolution of this portion of the claim is integrally tied to the outcome of the case.

In addition, the government attempts to steer the case away from this Court's consideration by incorrectly contending that the right to testify claim is fact-bound. However, Mr. Kagan's grievance is not limited to a factual claim. Rather, he argues that, as a matter of law, the trial court was required to recognize the right to testify as an independent right untethered to the more general right to be present and assist in one's own defense. And, that it was error for the trial court and the Circuit to gloss over such an important distinction when they considered whether Mr. Kagan's right to testify was protected in this case.

Had this distinction been made and considered, a reversal would have ensued. The government never presented any evidence that Mr. Kagan could in fact testify, or, more importantly, sustain the rigors of cross examination. And, even on the limited issue of being present and participating in the defense, Mr. Kagan's experts clearly demonstrated that he could not participate in a trial. And, although the government's expert refuted this conclusion, he admitted that Mr. Kagan would suffer a emotional crisis or collapse during trial, a finding which strongly demonstrates an inability to testify, the central issue.

In sum, Mr. Kagan's claim raises an issue that prompts this Court to resolve a conflict in the circuits, and, concomitantly, he raises an important question of federal law that should be addressed by this Court. Therefore, this Court should issue a writ of certiorari and reverse the conviction below.

**The Sentencing Guidelines and the Commentaries are akin to criminal statutes and the "any similar entity" clause cannot sustain a vagueness challenge.**

The Government in its reply brief stated that the sentencing guidelines are not akin to penal statutes since they do not define illegal conduct. Therefore, the Guidelines should not be subject to

the void for vagueness doctrine which has been applied to criminal statutes.

First, the Government fails to cite any cases from this Court that support their view. In fact, *Mistretta v. United States*, 488 U.S. 361 (1989), and *Stinson v. United States*, 508 U.S. 36 (1993), highlight the legislative nature of the Guidelines and the impact that they have on sentences. The Second Circuit has even held that the Guidelines have the force and effect of law, and that they are to be interpreted like criminal statutes. *United States v. Kirvan*, 86 F.3d 309, 311 (2d Cir. 1996); *United States v. Lewis*, 93 F.3d 1075, 1080 (2d Cir. 1996).

Petitioner urges this Court to hold that the Guidelines, just as criminal statutes, can be found to be impermissibly vague. Just as vague statutes tend to give rise to selective and arbitrary prosecutions, vague guidelines tend to give rise to selective and arbitrary sentences. The Government cannot seek to build a wall between criminal statutes and the Guidelines when they are so inexorably linked together.

The, catch all, "any similar entity" clause of the Application Note fails to provide a reasonable explanation for people of ordinary intelligence to understand what types of entities are "similar" when enhancing a sentence; and the vagueness of the phrase certainly encourages arbitrary and discriminatory sentencing. *See Kolender v. Lawson*, 461 U.S. 352 (1983); *McBoyle v. United States*, 283 U.S. 25 (1931). Thus, fair warning should be applicable to all phases of a prosecution, especially the sentencing phase.

**The Sentencing Commission exceeded its statutory mandate under the Financial Institution Sentencing Reform, Recovery and Enforcement Act of 1989 (FIRREA).**

The Government contends that the Sentencing Commission had the authority to broaden the definition of a financial institution to include non-federally insured entities and that this broadened definition was not inconsistent with FIRREA. These arguments are baseless.

First, there was no language in the enabling statute to indicate that Congress intended to apply the penalty enhancement to entities on such a broad scale. Second, by Congress expressly including only federally insured financial institutions, it can be presumed that it sought to exclude other entities such as small, privately held, premium finance companies. In a situation such as this, where Congress was clear on its intent to punish crimes against federally insured financial institutions, the Sentencing Commission broadened the definition excessively to the point where it is at odds with and is inconsistent with the statute. The Sentencing Commission usurped Congressional power and opened a floodgate for potential problems by including the "any similar entity" clause in its definition of a financial institution. The magnitude of the ambiguity that surrounds this clause allows courts to include entities that are so far off base from those that Congress intended. When the guidelines run afoul of a statute, as they did in this instance, they should be struck down. *Stinson v. United States*, supra. at 45; *United States v. Labonte*, 520 U.S. 751, 757 (1997).

**A premium finance company is not a financial institution within the meaning of the Application Note.**

The Government contends that since a premium finance company is "very like a bank" it fits within the definition of a financial institution. The Government also believes that since the issue is one of interpretation it should be left to the discretion of the Sentencing Commission and should not be an issue for the Courts.

The Second Circuit addressed this matter as a legal question and did not seek to pass the buck to the Sentencing Commission. The question for this Court is whether commercial businesses that suffer economic losses can be held to be financial institutions.

A premium finance company does not even come close to resembling a bank. In this case, CPF, the premium finance company, did not invest funds taken from the public, it was not a depository institution, nor did it hold funds in trust for the public.

The company was not federally insured, and it was a specialty business that concentrated solely on premium financing. It was a small, privately held company that had private clients. None of the insureds or the insurance companies involved with CPF were harmed by the collapse of the company. This type of entity does not meet the definition of a financial institution that Congress envisioned. *United States v. Uffman*, 1994 WL 504601 (W.D.Mo. 1994); *CPF Premium Funding v. Ferrarini, et. al.*, 1997 WL 158361 (S.D.N.Y. 1997)(holding that CPF was not a financial institution under the bank fraud statute).

The Second Circuit's reasoning on this point would impose substantial sentencing enhancements whenever a crime results in economic loss to a commercial business that borrowed money from a bank. This Court should strike down this over-reaching analysis and limit sentencing enhancements to financial institutions that truly meet the standard that Congress intended.

**An erroneous jury charge on intent, that invited the jury to convict on materially less evidence than the statute required, cannot be deemed harmless error.**

The Government contends that the jury could not have convicted Mr. Kagan based on the theory of deliberate ignorance. It bases its reasoning on the fact that since there was insufficient evidence of this theory, that the jury had to have convicted on the theory of actual knowledge. The Government's reasoning is erroneous and based on nothing but sheer speculation that is not supported by a shred of evidence.

If the Government's case against Mr. Kagan was so strong on actual knowledge they would not have needed to rely on a conscious avoidance charge. Indeed, the reason that the Government requested the conscious avoidance charge is because the case of actual knowledge was so weak. Additionally, the prosecutor in his summation highlighted the conscious avoidance theory to the jury which compounded the prejudice to Mr. Kagan. The case against Mr. Kagan was not overwhelming, it was a weak, circumstantial case that depended on an erroneous theory of intent that gave the jury a very low threshold to consider.

The Government's reliance on *Griffen v. United States*, 502 U.S. 46 (1991) misses the point. This is not a situation that is merely unsupported by the evidence. Unlike *Griffen*, this is a constitutional violation where a permissive presumption instruction on intent violated due process. *Ulster County Court v. Allen*, 442 U.S. 140, 157-163 (1979); *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985). Harmless beyond a reasonable doubt is the standard and "evidence beyond peradventure" does not satisfy it. Furthermore, as held in *United States v. Sun Diamond Growers of California*, 526 U.S. 398 (1999), an erroneous jury instruction that invited the jury to convict on materially less evidence than the statute demanded cannot be deemed harmless error.

**The evidence pertaining to the KBC mail fraud convictions was insufficient.**

Contrary to the government's assertion, "ample" evidence, as stated by the Second Circuit, does not satisfy the proof beyond a reasonable doubt standard set by this Court in *Jackson v. Virginia*, 443 U.S. 307 (1979).

## CONCLUSION

For the foregoing reasons, this Court should reject the arguments made in the government's opposition and it should issue a writ of certiorari.

Dated: March 19, 2001

Respectfully submitted,

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